



KAW NATION

Drawer 50
Kaw City, OK 74641
(580) 269-2552 Fax (580) 269-1157

National Indian Gaming Commission
Attn: Jeme Moore
1441 L Street, NW, Suite 9100
Washington, DC 20005

Re: NIGC Regulations On Facility Licensing Standards

Dear Chairman Hogen:

I write on behalf the Kaw Nation to comment on the NIGC's proposed rule for facility Licensing standards. First, we would like to note that the NIGC has published five major regulations in the period of one week and during a month where there are major industry and tribal events scheduled. Our Tribe objects to the 45 day comment period for this regulation and ask that it be withdrawn. At a minimum, the NIGC should grant Tribes an additional 90 day comment period and conduct a series of Tribal consultations within that time frame.

We believe the NIGC has violated the Government Performance and Results Act and has embarked on several rulemaking exercises without an overall plan in accordance with Public Law 109-221 (2006). As an agency charged with assisting Indian tribes to build strong tribal governments through Indian gaming it is essential that the NIGC engage in meaningful government-to-government consultation before moving forward with publication of such a major rule. The consultation cited by the Commission in the Federal Register refers to the draft copy of the rule released in April 2007. At no time did the NIGC consult with Tribes on the version of the rule published in the Federal Register.

Second, the NIGC is assuming authority that is not provided in the Indian Gaming Regulatory Act (IGRA). The background of Indian gaming is tribal sovereignty. The primary purpose of IGRA is to: "provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." Congress went to great lengths to respectfully allocate regulatory authority between Tribes, the NIGC, and States. The IGRA does not require repeat or periodic tribal licensing. IGRA clearly states that a "separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands." (25 U.S.C. 2710 (b)(1)(B) (emphasis added)).

The published rule subverts the direct language of IGRA by requiring tribal law to comply with a laundry list of NIGC requirements when issuing and renewing their facility licenses. While we agree that IGRA is quite clear that the Tribe must issue a license for each facility and that the NIGC has authority to review the authorizing tribal ordinance, the NIGC does not have authority to impose their facility licensing requirements on the Tribe. ~~This appears to be an attempt by the NIGC to assume new standard setting authority not provided under federal law.~~

I. *Requests For Information Already Maintained By Another Agency Violates The Paperwork Reduction Act*

The regulations may violate the Paperwork Reduction Act. The purpose of the Paperwork Reduction Act is to "minimize the paperwork burden for tribal governments ...resulting from the collection of information by or for the Federal Government" and to "strengthen the partnership between the Federal Government and tribal governments by minimizing the burden and maximizing the utility of information created, collected, maintained, used, disseminated, and retained by or for the Federal Government." 44 U.S.C. § 3501(1) and (6). The Paperwork Reduction Act is specifically designed to avoid agency information collection when a sister agency already maintains, or is required to collect, the information.

The NIGC is an agency of the Department of the Interior. As a sister agency, the Bureau of Indian Affairs (BIA), is charged with "maintenance of land records and title documents." 25 C.F.R. § 150.3 At least 90% of the time, the BIA will have the records in its possession that are necessary to answer the NIGC's questions. In fact, reference to the BIA maps of Indian country will often clearly establish that an Indian gaming facility is located within an Indian reservation.

When reviewing land determinations for new gaming facilities, the NIGC can simply request the information from the BIA. There is no need for the NIGC to create new burdens on Tribal Governments if the BIA does not have or cannot find trust land documentation.

II. There Is A Need For Tribal Consultation In The Determination Of The Necessity For These Regulations

The NIGC states that the "Commission consulted with Indian tribes so they could provide early and meaningful input regarding the formulation of the proposed rules ". This belies the fact that the NIGC has failed to consult with Tribes on the preliminary question of whether a facility licensing regulation is needed. Consultation with tribal governments may demonstrate that tribal law processes are more than sufficient to meet the concerns underlying the proposed regulation.'

Moreover, the consultation process behind this proposed rule falls far short of prior agency consultations where tribal representatives were active participants not only in providing advice and input, but also in the drafting process itself While this proposed rule may reflect some Tribal comments, the NIGC continues to shut tribes out of the initial drafting of regulations. Moreover, the NIGC made little effort to solicit wide-spread information from Tribes on how they are currently issuing and maintaining facility licenses.

To correct these problems, and to bring the NIGC into conformance with its own consultation policy, the proposed rule must be withdrawn and a series of regional and national tribal consultation meetings must be held to discuss the proposed rule.

III. Technical Comments

Facility Licensing Requirement

Tribes should be able to continue to issue their own licensing certificates for new facilities without additional requirements from the NIGC. The NIGC has failed to state any evidence indicating that the current system of tribal licensing should be altered.

¹ See NIGC Government-to-Government Tribal Consultation Policy, March 26, 2004, at §III(B), "[w]hen the NIGC determines that its formulation and implementation of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards may substantially effect or impact the operation or regulation of gaming on Indian lands by a tribe(s) under IGRA, the Commission will promptly notify the affected tribes and initiate steps to consult and collaborate directly with the tribe(s) regarding the proposed regulation and its need, formulation, implementation, and related issues and effects."

We also object to the onerous Indian land eligibility requirements for new gaming operations. These requirements micromanage tribal government regulation and intrude upon the sovereign right of tribes to manage their own affairs within their own reservation borders. We ask that you delete these requirements and consult with Tribes on a less onerous process for affirming that a new gaming facility is located on Indian lands that are eligible for gaming under IGRA.

Environment and Public Health and Safety Requirement

Requiring Tribes to renew facility licenses every three years to certify that each facility is compliant with the tribe's environmental public health and safety regulations is a back door attempt to impose a mandatory new system of Federal regulation on Indian Tribes. In addition to the Commission's lack of authority to issue and enforce such a directive, this particular requirement is also unnecessary because it duplicates existing Federal and Tribal laws and regulations.

Enforcing such a requirement will require a new bureaucracy within the NIGC to evaluate emergency preparedness (accidents, injuries, and medical emergencies, natural and other disasters, fire, and security threats), construction, maintenance and operations, drinking water and food; hazardous materials, and sanitation and waste disposal. Tribal governments, as with any government, exist to protect their citizens from harm. In major emergencies, Indian Tribes already work closely with the Federal Emergency Management Administration. With regard to facility construction, Tribes work with licensed inspectors to ensure that the work conforms to tribal building codes.

To ensure safe drinking water and sanitation and waste disposal, Indian Tribes work with the EPA under the Safe Drinking Water Act and the Resource Conservation and Recovery Act, among other laws. The Food and Drug Administration provides oversight of food and beverage safety. And finally, Tribes work with the Departments of Justice and Interior as well as State and local law enforcement and other agencies to ensure adequate protection for public health and safety. Any additional requirements unduly burden tribal governments, and directly conflicts with IGRA's primary purpose of promoting tribal economic development, self-sufficiency, and strong tribal governments.

Impact On Financing For Tribal Gaming Projects

Tribal Governments must have flexibility in order to secure financing for gaming development projects. The proposed regulation could create great uncertainty in the financial community regarding development on Indian lands. The regulation is unclear as to whether the NIGC intends to certify that a project will be located on Tribal land, or will Tribal certification and documentation be sufficient. Further, in order to make a timely determination, the NIGC would have to vastly expand its resources in order to process all new Indian land certifications. Please clarify whether or not the NIGC intends to review and approve all Indian land certifications submitted by Tribes.

In closing, we request that you withdraw the proposed rule from the Federal Register until the NIGC has provided Tribal Governments with an opportunity for meaningful government-to-government consultation. Thank you for your thoughtful consideration.

Sincerely,

A handwritten signature in black ink, appearing to be 'Gm' with a stylized flourish.

Guy Munroe, Chairman
Kaw Nation



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